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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

HENRY H. BOCKFINGER, APPELLANT,
v.
JOHN W. FOSTER, W. S. ROBERTSON, AND A. C. Schnell, trustees of Town Site Board No. 6, Oklahoma Territory. } No. 175.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF FOR APPELLEES.

STATEMENT.

The statement of the case made by counsel for appellant seems to be fair and accurate, and sets forth with sufficient regard to detail all necessary facts involved in the issue at present before this court. There seem to be but two questions involved:

First. Whether a suit in equity will lie against the defendants, who are town-site trustees under the act of Congress applicable to Oklahoma.

Second. Whether, if such action would lie against them, the town-lot claimants to whom they have conveyed should not necessarily be joined as codefendants in the suit.

ARGUMENT.

CAN THIS ACTION BE MAINTAINED AGAINST DEFENDANTS?

The facts and circumstances set forth by appellant in their brief, in all essential particulars, bring this case exactly in line with that of *McDaid* v. *Oklahoma* (150 U. S., 209), except that in that case the remedy sought was mandamus, and it was invoked to compel McDaid and the other town site trustees to issue a patent for certain lots to the relator, Smith, without allowing the contesting claimants for such lots an appeal to the General Land Office and the Secretary of the Interior, while in this case it is sought by a proceeding in the nature of a bill in equity to establish a resulting trust in the town site trustees in favor of the complainant, Bockfinger, who sought to hold a part of the town site as a homestead.

The real question involved in both cases is whether the town site trustees are in law and in fact officers of the United States holding the property involved in the issue for and in behalf of the United States; or whether by virtue of their patent from the United States issued to them as such trustees, and so expressly conveying to them in terms, the United States is so far divested of title as to constitute the land in question a private right in the trustees' hands.

For the purpose of ready reference by the court, and inasmuch as the appellant's brief does not contain the same, we think it proper to quote the statute by virtue of which the patents in question were issued to the town-site trustees (26 Stat. L., 109):

Be it enacted, etc., That so much of the public lands situate in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as town sites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees, including the survey of the land into streets, alleys, squares, blocks, and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such town site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees:

Provided, That the Secretary of the Interior may, when practicable, cause more than one town site to be entered and the trust thereby created executed in the manner herein provided by a single board of trustees, but not more than seven boards of trustees in all shall be appointed for said Territory, and no more than two members of any of said boards shall be appointed from one political party.

SEC. 2. That in the execution of such trust and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any town site, the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder.

Provided, That nothing in this act contained shall be so construed as to make valid any claim now invalid of those who entered upon and occupied said lands in violation of the laws of the United States or the proclamation of the President thereunder: *Provided further*, That the certificates hereinbefore mentioned shall not be taken as evidence in favor of any person claiming lots who entered upon said lots in violation of law or the proclamation of the President thereunder.

SEC. 3. That lots of land occupied by any religious organization, incorporated or otherwise, conforming to the approved survey within the limits of such town site, shall be conveyed to or in trust for the same.

SEC. 4. That all lots not disposed of as hereinbefore provided for shall be sold, under the direction of the Secretary of the Interior, for the benefit of the municipal government of any such town, or the same, or any part thereof, may be reserved for public use as sites for public buildings, or for the purpose of parks, if in

the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

SEC. 5. That the provisions of sections four, five, six, and seven of an act of the legislature of the State (of) Kansas, entitled "An act relating to town sites," approved March second, eighteen hundred and sixty-eight, shall, so far as applicable, govern the trustees in the performance of their duties hereunder.

SEC. 6. That all entries of town sites now pending on application hereafter made under this act shall have preference, at the local land office, of the ordinary business of the office, and shall be determined as speedily as possible; and if an appeal shall be taken from the decision of the local office in any such case to the Commissioner of the General Land Office, the same shall be made special, and disposed of by him as expeditiously as the duties of his office will permit; and so if an appeal should be taken to the Secretary of the Interior. And all applications heretofore filed in the proper land office shall have the same force and effect as if made under the provisions of this act; and upon the application of the trustees herein provided for, such entries shall be prosecuted to final issue in the names of such trustees, without other formality; and when final entry is made, the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided.

SEC. 7. That the trustees appointed under this act shall have the power to administer

> oaths, to hear and determine all controversies arising in the execution of this act, shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same, and all conveyances executed by them shall be acknowledged before an officer duly authorized for that purpose. They shall be allowed such compensation as the Secretary of the Interior may prescribe, not exceeding ten dollars per day while actually employed, and such traveling and other necessary expenses as the Secretary may authorize, and the Secretary of the Interior shall also provide them with necessary clerical force by detail or otherwise.

Those portions of the demurrer which cover the point under consideration are stated as follows (Rec., p. 50):

> Second. Said defendants further demur to the complaint for the reason that this court has not jurisdiction of the subject of the action.
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> Third. Said defendants further demur for the reason that this court has not jurisdiction of these defendants in their capacities as trustees of town site board No. 6 as set out in the complaint.

The learned counsel for appellants start out with the proposition that the patent of the United States conveying the land in question to the town-site trustees divested the United States of all of its right and title in and to the land; that except for the supervisory and

appellate control of the Commissioner of the Land Office and the Secretary of the Interior in the disposition of the lots platted from the land, the United States had remaining no interest whatever in the land, and could not be reinvested with the title to the same except through the intervention of a court of equity, by reason of some fraud, accident, or mistake in procuring the land to be patented to such trustees; and that as against a homesteader claiming the right to the land the town-site trustees were in every respect the holders of a private right or claim with full title to the land in question, subject to a decree of a resulting trust in said trustees in favor of a homesteader who could establish his rights in the courts to have the land decreed to rightfully belong to him.

We herewith give the text of the patent in this case, omitting the attestation and signatures, which are unnecessary:

> Whereas John Foster, W. S. Robertson, and A. C. Schnell, town-site board No. 6, assigned to West Guthrie, in Logan County, Oklahoma Territory, in trust for the several use and benefit of the occupants of the town site of West Guthrie, in said county and Territory, according to their respective interests, have deposited in the General Land Office of the United States a certificate of the register of the land office at Guthrie, Oklahoma Territory, whereby it appears that full payment has been made by the said John Foster, W. S. Robertson, and A. C. Schnell, trustees as aforesaid in trust as aforesaid, according to the provisions of the act of

Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands" and the acts supplemental thereto, including the act of May 14, 1890, for the west half of section eight, in township sixteen north, of range two west of Indian meridian, in Oklahoma Territory, excepting a reservation for park purposes, described as follows: (Commencing at a stake forty feet west and forty feet south of the northeast corner of the southwest quarter of the aforesaid section eight; thence south eighty-nine degrees and forty-one minutes west, six hundred and eighty feet to a stake; thence south one thousand and sixty feet to a stake; thence north eighty-nine degrees and forty-one minutes east, two hundred and seventy feet and eight-tenths to a stake; thence south thirty-seven degrees east, one hundred feet to a stake; thence south fifty-five degrees east, one hundred and seventy-five feet to a stake; thence south eighty-eight degrees east, two hundred and four feet and five-tenths to a stake; thence north twelve hundred and fifty feet to the place of beginning, containing seventeen acres and nine-tenths of an acre), said town site containing three hundred and two acres and one-tenth of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor-general, which said tract has been purchased by the said John Foster, W. S. Robertson, and A. C. Schnell, trustees as aforesaid, in trust as aforesaid.

Now, know ye, That the United States of America, in consideration of the premises and

> in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said John Foster, W. S. Robertson, and A. C. Schnell, trustees as aforesaid, in trust as aforesaid, and to their successors, the said tract above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said John Foster, W. S. Robertson, and A. C. Schnell, trustees as aforesaid, in trust as aforesaid, and to their successors and assigns in trust as aforesaid.

In reply to this theory, we think it proper to contend that under this Oklahoma town-site act the patent conveying to the trustees was merely the conveyance by authority of Congress of the title to the land from one set of officers of the United States to another for the purposes of administrative convenience, and that the real title was just as fully in the United States and its officers after such patent was executed and delivered as it was while the land remained strictly a part of the public domain. Or, stated in a different form, we understand appellant's contention to be that it is impossible in law that the United States can convey by such a patent and not absolutely divest itself of all title to the land, and hence that upon such conveyance as was made by this patent all title passed from the United States and vested absolutely in appellees.

To which we say that by the act of Congress machinery was provided whereby the United States could execute such a conveyance to its officers, the

town-site trustees, for certain purposes and those purposes only, and this, except for those purposes, leaves not only the title but the equitable interest in the lands combined in the United States and not in the trustees, so as to create an indefeasible title and private right in the latter. This doctrine was undoubtedly that contended for by the United States attorney in the court below, and entertained and adopted by the court below in holding the demurrer good.

The McDaid case is quoted from in the opinion of the court below, the judge using the following very applicable and pointed language of this court:

> They unquestionably in that regard acted as representatives of the Government (meaning the town-site trustees). As a matter of convenience the trustees were the instrumentality for the transmission of title in respect of lands disposed of to actual holders, while the Secretary, notwithstanding the patent, was the medium as to surplus lands, which he could not be if the legal title had definitely passed to the trustees by patent for the whole site. The trust upon which the title was held was to be discharged in accordance with the regulations, and was necessarily subject to the supervisory power of the Department of the Interior. The Government retains its connection by having the entry made by its own agents and the trust executed in the manner it directs. By the scheme of this act the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the Government until the rightful claimants and the undisposed surplus lands are ascertained.

In a long line of decisions this court has held, in substance and effect, that the action of the Department of the Interior, as an administrative arm of the Government, having in its keeping and under its control the public lands, must be held supreme and authoritative in all matters appertaining to their custody, control, and disposal; and that while the courts will not interfere with such authority while the lands belong to the United States, yet when they are disposed of in such a manner as to finally divest the United States of its title, so that such lands become the subject of a private right, then it is perfectly proper for a court of equity to assume jurisdiction in the premises and correct any wrong of a legal character which has occurred under the Government's administration, redress any wrongs of private parties, and dispose of the property according to the very right of the matter involved. Applying that doctrine to this case, it may be safely and properly conceded as possible that appellant may have rights which will, as against some one, be the subject of equitable jurisdiction of the courts. But the true question is, *When will the proper occasion arise?* We need not grope in the dark upon this point. This court more than thirty years ago, in a well-considered case, *Johnson* v. *Towsley* (13 Wall., 72), clearly and definitely stated the rule in an opinion delivered by Mr. Justice Miller, from which we quote at page 87:

> This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the

> Government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the Government and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public land, the party holding that title should hold absolutely as his own or as trustee for another, and we are satisfied that the relations thus established between the courts and the Land Department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law.

The time, then, is when the ownership of lands has assumed the nature of a *private right.*

The case of the *United States, ex rel. McBride*, v. *Schurz, Secretary of the Interior* (102 U. S., 402) does not seem to us to be analagous to this for the reason that there the Government had finally patented in such a way as to fully divest itself of all interest in the land in question, and in such a way as to create an absolute private right. Under such circumstances it was very properly held that the remedy, if any existed against the patentee, was in a court of equity. We do

not dispute this doctrine, which seems to be in entire consonance with that stated by Mr. Justice Miller in the Johnson-Towsley case above quoted from. The distinction is so plain and explicit that it seems difficult to confound or misunderstand the same.

The case of *Wilcox* v. *Jackson* (13 Pet., 498), quoted from appellant's brief, pages 11 and 12, simply goes to the same effect as our concession hereinbefore made, viz, that while the title of the land is in the United States, it is subject to the control of the proper Department having the care and custody of the public domain; but when the title has passed out of the United States, then courts of equity, either State or Federal, may take up and decide questions as to its rightful ownership.

The language quoted by counsel from the case of Emblen, 161 U. S., 52 (brief, p. 10), in nowise modifies the general doctrine we have contended for and in no sense adds strength to the contention of the appellant, and we repeat that we do not contend that if parties should obtain a regular patent from the United States, which has the effect to finally divest the United States of its title, that such parties can be pursued in a court of equity as holders of a resulting trust in favor of others holding a superior equitable right. But we repeat that the Emblen case has no tendency to establish the claim made by appellant in this case that the patent to the town-site trustees divested the United States of all title, and operated to create ownership in them as in private parties.

But it is asserted by appellant's counsel, in support of their contention that the title became absolutely vested as a private right in the trustees, that no provision for reversion to the United States was contained in the patent which issued to them. Under our view of that patent, such a condition was unnecessary, simply because the patent created a trust under a special act of Congress in the parties named as trustees and appointed *as officers of the Government*, and not a patent creating a private right. This view does not contradict the doctrine laid down in the case of *Van Wyck* v. *Knevalls* (106 U. S., 360). That was a case in which this court held that the act of Congress granting land in aid of railroads had the effect to vest the title *in presenti* in the railroad company upon filing its map of definite location, and in the event of any failure that it was necessary that judicial proceedings should be taken to reclaim the lands granted by the United States.

The case of the *Germania Iron Co.* (165 U. S., 379) has the same effect as the one last above quoted, but no greater, in its bearing upon the question here.

But some weight is claimed from the alleged fact that *Payne* v. *Robertson* (169 U. S., 323) was decided upon its merits, and that it was exactly like this case in the relative position of the parties. Indeed, the counsel for appellant claim that that case is decisive of this one for the reason last above stated. They claim that this court therein impliedly proceeded to hear and determine the case upon the merits of the controversy. But this contention is entirely without

weight when that case is examined. It is true that Payne claimed the land as a homestead; it is true that it was a part of this same town site; it is also true that the defendants were town-site commissioners; it is also true that the case was decided by the court upon demurrer, and that several grounds of demurrer were alleged. But the main and absolutely essential feature alleged by appellants here, namely, that the case was heard by this court *on its merits*, was wanting. That case was not heard upon its merits, but merely upon one ground of demurrer. Complainant there had stated affirmatively in his bill that he was in the Territory, and not on the outside, at 12 o'clock noon of the day when the President's proclamation threw down the fences and permitted the public to enter. He was one of the class expressly excluded from entering the lands under the homestead law by the President's proclamation. Having affirmatively stated *that* in his bill of complaint, and the demurrer having thereupon expressly questioned his rights, this court held against him upon that question and not at all upon the merits of the controversy. Further comment in respect to that case is unnecessary.

SHOULD THE TOWN-LOT CLAIMANTS HAVE BEEN JOINED AS PARTIES?

Counsel for appellants is correct in claiming that the first question is the main one, and that if the suit could not be maintained against appellees, as the supreme court of the Territory held, it is not material whether the claimants of the lots should or should not be made codefendants.

If the parties who settled upon this land and obtained rights to the lots embraced in the land in question thereafter obtained patents or deeds from the town-site trustees who are appellees here, undoubtedly their rights under such patents would relate back to the time when they settled upon and made claims to their respective lots. We are unable to understand why, even though they had not actually obtained deeds, they might not have been made parties defendant if they were known. Under the act of Congress they had equitable interests, even though such interests had not ripened into actual ownership by deed. We can not see any force in the claim made for appellant that it would not have been a hardship to ascertain who they were, because appellant was on the ground claiming the lands in question. There was not a great number of the claimants, and it is nowhere asserted in the record that it was impossible to have ascertained their names or the character and extent of their respective claimants. Mere difficulty in obtaining this information would not excuse failure to make them parties. The hardship, therefore, would have been only such as is often incident to the commencement of suits in equit · or actions at law, and can be no adequate excuse for appellant's failure in this regard.

We think there is nothing in the contention so strenuously made that the manner of pleading the demurrer of the appellees was insufficient because of the supposed requirements of the code of Oklahoma that a demurrer for want of parties must furnish the

name of parties supposed to be wanting. If it is true that the complaint by which this case was begun was filed under the code of Oklahoma, inasmuch as this case is purely one for equity jurisdiction, the complainant, who is appellant here, must have ignored the fact that the equity system is retained in the Federal courts. We think, therefore, that this case should have been commenced by the filing of a bill in equity and not by a complaint under the code, and if we are correct in this belief, we see no reason for the claim that merely by commencing the suit under the code the complainant could compel the defendants to comply with code procedure or code requirements in filing a demurrer to their complaint. Any form of demurrer which would be sufficient under equity pleading and practice must have been sufficient in this case, and as there is no rule in equity practice requiring a demurrer to be thus specific, the demurrer, as stated by appellees in this case, was ample to meet the requirements of the case.

The whole subject of the failure of parties is discussed so fully and thoroughly by the supreme court of Oklahoma in its opinion in this case, which opinion is transmitted with the record (pp. 58 to 67, inclusive), that it seems an unnecessary consumption of the time of the court and of labor upon the part of counsel to traverse this ground a second time. Such an effort would be an unnecessary addition to the volume of this case. Nor have we been able to discover in the brief of learned counsel for appellant any argument or

suggestion which in any way tends to add weight to the contention made by them in the court below respecting this question of their failure to join the proper defendants.

THE MERITS.

A large amount of space is given by counsel for appellant in their brief to the discussion of the merits of the case. This is upon the theory that this court may think it proper to pass upon the merits of the case. If we understand the record herein, the complaint was filed, and in the body of the same, or subjoined as exhibits, were the whole series of proceedings before the register and receiver, the Commissioner of the General Land Office, and the Secretary of the Interior. To this complaint a demurrer was filed by defendants. The complainant thereupon elected to stand upon the demurrer. Not a word of testimony has been taken in this suit. No attempt has been made by the lower court to pass upon the merits involved. It therefore seems strange that it should be contended that this court of last resort would proceed, in any event, to take up the case and pass upon its merits as shown in said complaint and exhibits without an opportunity upon the part of the appellees to answer over in the court below and proceed to a trial of any issues which might be framed, and the testimony and evidence which might be adduced under the answer which would probably, in such event, be filed.

The questions of fact in the case presented before the departmental officers, as shown by the exhibits,

must have been passed upon by such officers by whom the same were considered and they must have been passed upon adversely to claimants. No opportunity has been given the lower courts to decide whether there were errors of law made by the departmental officers. No answer was filed by appellees and therefore no argument was made by counsel upon the real merits of the controversy. And even the facts in the case, by such a trial as would necessarily occur upon an issue joined on the merits in the lower court, might be shown to be materially different from those presented by the testimony before the register and receiver of the land office. In short, we think the whole question would have to be carefully litigated *de novo* in the lower court before this court would assume to attempt a final decision of the case. We therefore refrain from attempting any argument upon the merits.

Respectfully submitted.

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Special Assistant to the Attorney-General.

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